

were infringing the Plaintiffs' trade-mark; but the plain statement which the affidavit ought to have contained, and for the omission of which there really is no excuse, is not there."

In *Dickson v. Law and Davidson* ⁽²⁾ it was held that the omission was a mere irregularity and not a matter of substance. North J. stated in that case as follows:—

"And so, I think, when there is enough to satisfy the Court that the plaintiff has a good cause of action, the absence of a formal affidavit to that effect is not a matter of substance; and though, if my attention had been directed to the point when I made the order, I should have required such an affidavit to be made, I do not think I am bound by reason of its absence now to set aside the service of the writ."

In *Vaudrey and Others v. Nathan* ⁽³⁾ the plaintiffs' claim was for fees for work done and money expended as solicitors. Hawke J. made an order for leave to issue a concurrent writ against the defendant and for leave to serve a writ upon the defendant in Monte Carlo or elsewhere in the State of Monaco. The defendant applied to set aside the order on the ground that the affidavit was not sufficient. Humphreys J. dismissed the summons. On appeal to the Court of Appeal, the order for service out of the jurisdiction was set aside. Scrutton L.J. gave the following judgment in that case:—

"The power of our Superior Courts to allow service out of the jurisdiction must be exercised with great care and circumspection. In some countries it is looked upon with great disfavour. Order XI of the Rules of the Supreme Court lays down the conditions upon which the leave may be given. One of these is that the affidavit in support of the application for leave should state that the deponent believes that the plaintiff has a good cause of action. In my view a statement to that effect is vital, and the Court ought not to grant leave unless the application is supported by the evidence on oath of a responsible person that he believes in the plaintiff's claim, and it would be a very bad precedent to grant the application in the absence of such testimony."

Vaudrey's case was followed by Mills J. in the Singapore case of *Ban Aik & Co. v. K. U. Chuan* ⁽⁴⁾ in setting aside the order made in that case for service out of the jurisdiction.

It has been argued in the present case that paragraph 4 of Mr. Teale's affidavit sets out the nature of the plaintiffs' claim against the defendant and it is implied in that statement that the plaintiff has a good cause of action. I do not agree. It is clear from Order 11 Rule 4 that the affidavit must state (a) the ground upon which the application is made: this means the nature of the proposed cause of action and the relief sought and sufficient facts to enable the Court to decide whether the case is a proper one under Order 11 Rule 1; (b) that in the belief of the deponent the plaintiff has a good cause of action; and (c) in what place or country such defendant is or probably may be found. If the affidavit fails to satisfy any of the three condi-

tions specified above, the Court will not make an order for service outside the jurisdiction. It is clear that condition (b) was not satisfied in the present case, therefore, in the light of such weighty authority as the decision of the Court of Appeal in *Vaudrey and Others v. Nathan* I feel I have no option but to grant the defendant's application, and accordingly I discharge the order for leave to issue the writ and make an order that the plaintiff do pay the defendant the costs of this application.

Although the order I have made will get rid of the action altogether, so that it is not necessary to deal with any of the other matters raised by the defendant in his Notice of Motion, I must state that I find no merit in any of those matters. It is contended that the writ was bad in law in that it was dated the 5th day of February, 1960, but I am satisfied on the evidence that the writ was not issued until long after the order for its issue was made. It is clear that no steps were taken to have the writ issued prior to the date of the order of the Court made on 16th February, 1960 and that it was wrongly dated the 5th February, 1960 through an error by the Court when it was ultimately issued for service. I also find no irregularity in the order for substituted service made on 9th August, 1962. Where a writ has been issued for service out of the jurisdiction when the defendant is abroad, it may be served on him if he comes within the jurisdiction, although it is not in the form used for service within the jurisdiction. Consequently there is no irregularity in its service on an agent of the defendant within the jurisdiction on an order for substituted service. I find support for this proposition in the case of *Western Suburban and Notting Hill Permanent Benefit Building Society v. Rucklidge*.⁽⁵⁾ If there was no irregularity in the order for substituted service, the service itself was perfectly valid.

Order accordingly.

Solicitors:—*Athi Nahappan & Co.; Skrine & Co.*

KWAN TECK MENG & ORS. v. LIEW SAM LEE

[O.C.J. (Gill J.) August 6, 1963]

[K.L.—Civil Suit No. 45 of 1962]

Land Laws—Transfer by way of gift—Death of transferor before registration—Whether transfer void—Land Code ss.42(iii) & 85(ii)—“Void”—Meaning of.

Landlord and Tenant—Beneficial interest—Lease under Land Code s.47—Notice—Premises required by owners for own use—Greater hardship.

Contracts (Malay States) Ordinance, 1950, s.26—

Agreement without consideration made on account of love and affection—Interpretation. A

The defendant became tenant of the ground floor of No. 88 Pudu Road, Kuala Lumpur in 1948 which was then owned by one K.L.K. Paragraph 2 of the tenancy agreement states "The tenancy is continuous and the landlord shall not terminate or eject the tenant unless and until the tenant is in arrears of the rent to the extent of 2 months' rent, i.e. reckoning the deposit of one month's rent of \$100." On June 27, 1957, K.L.K. executed a memorandum of transfer in accordance with the provisions of section 110 of the Land Code transferring the land on which the premises stood to four of his sons, K.T.H., K.T.S., K.T.E. and K.T.M., his daughter-in-law E.K.S. and one K.K.C. as trustee for K.T.B. K.L.K. died on July 3, 1957 and the transfer executed by him was registered on September 20, 1957. Subsequently K.T.H. and K.T.E. transferred their shares in the land to their mother W.F.Y. on April 19, 1960. All these transfers were made in consideration of love and affection and therefore by way of gift.

The plaintiffs as registered proprietors commenced proceeding for recovery of possession of the premises on the ground that as owners they required the premises for occupation by themselves for the purpose of carrying on the business of a motor car agency. The defendant was using the premises primarily for residential purposes.

The defendant argued that (1) the plaintiffs had no right to maintain the action because the transfer dated June 27, 1957 not being registered before the death of the transferor, the transfer was void by reason of section 85(ii) of the Land Code; (2) the plaintiffs have no right to terminate the tenancy because of paragraph 2 of the tenancy agreement; (3) the plaintiffs did not reasonably require the premises for themselves and (4) greater hardship would be caused by granting the order than by refusing it.

Held: (1) although the registration of a transfer presented after the death of the transferor is void, the word "void" does not mean utterly null and void for all purposes or void *ab initio*; it means voidable in the sense that it is liable to be defeated at the instance of the immediate vendor or any beneficiary or any other person interested in or equitably entitled to the land. In this case as K.L.K. had done everything necessary in his power to effectively divest his beneficial interest in the land to the plaintiffs; the plaintiffs, as the registered proprietors thereof had the right to sue and be sued in respect of any claim relating to the premises;

(2) clause 2 of the tenancy agreement did not make the tenancy a life tenancy, and if it did, it was void as a lease under section 47 of the Land Code for lack of registration;

(3) the plaintiffs required the premises for their own use;

(4) greater hardship would be caused to the plaintiffs if no order was made because it was more difficult for them to find business premises than for the defendant to find residential premises.

Cases referred to:—

- (1) *Haji Osman bin Abu Bakar v. Saiyed Noor bin Saiyed Mohamad* [1952] M.L.J. 37.
- (2) *Loke Yew v. Port Swettenham Rubber Co. Ltd.* [1913] A.C. 491.
- (3) *Rose & Ors. v. Inland Revenue Commissioners* [1952] 1 All E.R. 1217.
- (4) *Milroy v. Lord* (1862) 45 E.R. 1185.
- (5) *Re Rose (deceased) Midland Bank Executor &*

Trustee Co. Ltd. v. Rose & Ors. [1948] 2 All E.R. 971 at p.978.

(6) *Re Fry* [1946] 2 All E.R. 106.

(7) *Anning v. Anning* (1907) 4 C.L.R. 1049.

(8) *Zimble & Anor. v. Abrahams* [1903] 1 K.B. 577.

(9) *Powell v. Cleland* [1948] 1 K.B. 262.

(10) *Lucas v. Linehan* [1950] 1 K.B. 548.

(11) *McIntyre & Anor. v. Hardcastle* [1948] 2 K.B. 82.

(12) *Sims v. Wilson* [1946] 2 All E.R. 261.

(13) *Maguire v. Stewart* [1950] S.L.T. (Sh. Ct. 22).

(14) *Nevill v. Hardy* [1921] 1 Ch. 404, 408.

(15) *Perak Hauliers Ltd. v. The Cycle & Carriage & Co. Ltd.* [1962] M.L.J. 12.

ACTION.

N. A. Marjoribanks (Richard Talalla with him) for the plaintiffs.

S. D. K. Peddie for the defendant.

Cr. Adv. Vult.

Gill J.: This is an action for the recovery of possession of the ground floor of the premises known as No. 88, Pudu Road, Kuala Lumpur, which stand on land held under Certificate of Title No. 2309 for Lot No. 127, section 19 in the Town of Kuala Lumpur. The defendant became a tenant of the ground floor by virtue of a tenancy agreement dated the 4th of March, 1948 entered into between him and the then registered proprietor and landlord of the premises named Kuan Leong Kim.

On 27th June, 1957 when he was seriously ill, Kuan Leong Kim executed a memorandum of transfer in accordance with the provisions of section 110 of the Land Code (F.M.S. Cap. 138), whereby he transferred the whole of his right title and interest in the land on which the premises are built to four of his sons named Kuan Teck Huat, Kuan Teck Sing, Kuan Teck Eng and Kuan Teck Meng, his daughter-in-law named Eng Kim Seng and one Kuan Kong Cheong as trustee for his youngest son named Kuan Teck Bee. Kuan Leong Kim died on 3rd July, 1957, and the transfer executed by him on 27th June, 1957 was registered in the appropriate land registry on 20th September, 1957. Kuan Teck Huat and Kuan Teck Eng executed a transfer of their shares in the land to their mother named Wong Foo Yoong on 7th April, 1960. This transfer was registered on 19th April, 1960. Thus, as from that date the present plaintiffs became the registered proprietors and landlords of the premises and they have brought the present action for recovery of possession as owners of the premises.

The transfer dated the 27th June, 1957 was expressed to be in consideration of a sum of \$25,000 alleged to have been paid by the transferees to the transferor. However, all the transferees have given evidence to say that in fact they paid no money and that the transfer was a gift. I am satisfied on that evidence, and I find as a fact, that this transfer was in consideration of love and affection and was therefore by way of a gift. The transfer dated 7th April, 1960 was also expressed to be in consideration of a sum of \$10,410 alleged to have been paid by the transferee to the transferors. Here again I am satisfied on the evidence and find as a fact that the transfer was in consideration of love and affection and therefore by way of a gift.

One of the grounds on which the claim for possession is resisted by the defendant is that the plaintiffs have no right to maintain this action. His contention is that the transfer dated 27th June, 1957 is void by reason of section 85(ii) of the Land Code (F.M.S. Cap. 138) which reads as follows:—

"The death of any person prior to the presentation of any instrument executed by him shall prevail so as to prohibit the registration of such instrument, and such instrument if registered shall be void."

It is further contended that the registration of this transfer is void under section 42(iii) of the Land Code and that consequently the title of the plaintiffs as proprietors is not indefeasible. Section 42(iii) of the Land Code reads as follows:

"If the registration of any proprietor, chargee or lessee has been obtained by forgery or by means of an insufficient or void instrument such registration shall be void."

I think it is abundantly clear from the provisions of the Land Code to which I have referred that the transfer dated 27th June, 1957 and its registration are both void because it was presented for registration after the death of the transferor. However, the word "void" does not mean utterly null and void for all purposes or void *ab initio* as if it were never in existence; it means voidable in the sense that it is liable to be defeated at the instance of the immediate vendor or any beneficiary or any other person interested in or equitably entitled to the land. The legal position in a case such as this was considered by the Court of Appeal in *Haji Osman bin Abu Bakar v. Saiyed Noor bin Saiyed Mohamad*.⁽¹⁾ It was held in that case that the death of a transferor does not void the contract and that the legal personal representative of such deceased person becomes the trustee for the purchaser who, subject to the terms of the contract and in the absence of fraud, misrepresentation or mistake, is entitled to the land and to

possession. Pretheroe Acting C.J. stated in the course of his judgment as follows:

"In *Loke Yew v. Port Swettenham Rubber Company Limited* (2) the position is clearly stated. Where a contract for a sale of land has been completed 'but the contract is not effective to convey any estate in land unless it is registered' 'the effect of the instrument rested in contract until registration.' As death does not avoid a contract of this nature it seems clear that the same principles apply where a proprietor dies and his representative becomes the registered proprietor. As such he can, in my opinion, be compelled to take all steps necessary to give effect to the contract executed by the deceased proprietor."

Mr. Marjoribanks on behalf of the plaintiffs contended that by executing the transfer and handing over the title deed the deceased Kuan Leong Kim had done all in his power to divest himself of all his right title and interest in the land and to vest it in the transferees, and that the transfer was effective, as between the deceased and the transferees, to divest the deceased of beneficial ownership and to constitute the transferees the beneficial owners of the land. In support of his contention he cited the case of *Re Rose (deceased), Rose and Others v. Inland Revenue Commissioners*.⁽³⁾ This was a case which related, *inter alia*, to a transfer by way of gift of certain shares in a company, such transfer being required to be registered with the company under its Articles of Association. Sir Raymond Evershed M.R. in the course of his judgment referred to the following passage from the judgment of Turner L.J. in *Milroy v. Lord*⁽⁴⁾:—

"I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

His Lordship then dealt with the earlier case which also bears the name of *Re Rose (deceased) Midland Bank Executor and Trustee Co. Ltd. v. Rose and Others* (5) and quoted the following passage from the judgment of Jenkins J. in that case:—

"I was referred to *Milroy v. Lord*, and also to *Re Fry*.⁽⁶⁾ Those cases, as I understand them, turn on the fact that the deceased donor had not done all in his power, according to the nature of the property given, to vest the legal interest in the property in the donee. In such circumstances it is well settled that there is no equity to complete the imperfect gift. If any act remains to be done by the donor to complete the gift at the date of the donor's death, the court will not compel his personal representatives to do that act and the gift remains incomplete and fails. In *Milroy v. Lord* the imperfection was due to the fact that the wrong form of transfer was used for the purpose of transferring certain bank shares. The document was not the appropriate document to pass any interest in the property at all."

His Lordship then proceeded to read the following passage from the same judgment of Jenkins J. in relation to the case of *Re Fry*:—

"In this case, as I understand it, the testator had done everything in his power to divest himself of the shares in question in favour of Mr. Hook. He had executed a transfer. It is not suggested that the transfer was not in accordance with the company's regulations. He had handed that transfer together with the certificates to Mr. Hook. There was nothing else the testator could do."

Having read the above passage His Lordship continued to state his own view as follows:—

"I venture respectfully to adopt the whole of the passage I have read which, in my judgment, is a correct statement of the law. If that be so, then it seems to me that it cannot be asserted on the authority of *Milroy v. Lord*, and I venture to think it also cannot be asserted as a matter of logic and good sense or principle, that because, by the regulations of the company, there had to be a gap before Mrs. Rose could, as between herself and the company claim the rights which the shares gave her vis-a-vis the company, Mr. Rose was not in the meantime a trustee for her of all his rights and benefits under the shares."

Jenkins L.J. also dealt with *Milroy v. Lord* in the following passage of his judgment in this later case of *Re Rose*:—

"Counsel for the Crown has referred us to the well-known case of *Milroy v. Lord*, which has been his sheet-anchor. He says that on this authority we must be forced to the conclusion that, pending registration, the transfers had no effect at all, and he arrives at that conclusion in this way. He says that these transfers, while purporting to be transfers of the property in the shares and not declarations of trust, did not transfer the property in the shares because registration was necessary in order to get in the legal title. He says further that being transfers purporting to be transfers of the property in the shares and failing of their effect as such for want of registration, they could, pending registration, have no operation at all because in *Milroy v. Lord* it was held that a defective voluntary disposition purporting to operate as a transfer or assignment of the property in question would not be given effect to in equity as a declaration of trust. I agree with my Lord that *Milroy v. Lord* by no means covers the question with which we have to deal in the present case. If the deceased had in truth transferred the whole of his interest in these shares so far as he could transfer the same, including such right as he could pass to his transferee to be placed on the register in respect of the shares, the question arises, what beneficial interest had he then left? The answer can only be, in my view, that he had no beneficial interest left whatever; his only remaining

interest consisted in the fact that his name still stood on the register as holder of the shares, but, having parted in fact with the whole of his beneficial interest, he could not, in my view, assert any beneficial title by virtue of his position as registered holder. In other words, in my view the effect of this transaction, having regard to the form and the operation of the transfers, the nature of the property transferred, and the necessity for registration in order to perfect the legal title, coupled with the discretionary power on the part of the directors to withhold registration, must be that, pending registration, the deceased was in the position of a trustee of the legal title in the shares for the transferees."

His Lordship concluded his judgment by stating the legal position succinctly as follows:—

"In my view, a transfer under seal in the form appropriate under the company's regulations, coupled with delivery of the transfer and certificate to the transferee, does suffice, as between transferor and transferee, to constitute the transferee the beneficial owner of the shares, and the circumstance that the transferee must do a further act in the form of applying for and obtaining registration in order to get in and perfect his legal title, having been equipped by the transferor with all that is necessary to enable him to do so, does not prevent the transfer from operating, in accordance with its terms as between the transferor and the transferee, and making the transferee the beneficial owner."

Halsbury, 3rd edition, Volume 18, at page 396 sums up the law in the following words:—

"If a gift is to be valid the donor must have done everything, which, according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do."

There is a footnote to the above paragraph in the following words:—

"The test is whether any act remains to be done by the donor and not the donee or trustees in order to perfect the title to the property."

Hoggs on "Registration of Title" at page 328 states the position as follows:—

"Although the title of the transferee under a statutory transfer is not complete until registration, yet if the transfer is made by way of gift from the registered owner to the transferee, the gift is complete on the execution of the transfer and delivery to the donee, since what remains to be done — the registration — can be done by the donee-transferee himself."

The authority cited for the above statement by Hogg is the Australian case of *Anning v. Anning*⁽⁷⁾ in which Griffith C.J. said:—

"The whole law on the subject is contained in the judgment of Turner L.J., in *Milroy v. Lord*. . . I think that the words 'necessary to be done' as used by Turner L.J., in *Milroy v. Lord*, mean necessary to be done by the donor. Thus, in the case of shares in a company which are only transferable by an instrument of transfer lodged with the company, I think that the donor has done all that is necessary on his part as soon as he has executed the transfer. So, in the case of a gift of land held under the Acts regulating the transfer of land by registration, I think that a gift would be complete on execution of the instrument of transfer and delivery of it to the donee. If, however, anything remains to be done by the donor, in the absence of which

the donee cannot establish his title to the property as against a third person, the gift is imperfect, and in the absence of consideration the Court will not aid the donee as against the donor. But if all that remains to be done can be done by the donee himself, so that he does not need the assistance of the Court, the gift is, I think, complete."

The transfer in the present case was made on account of natural love and affection between the parties. In this connection section 26 of the Contracts (Malay States) Ordinance, 1950, provides as follows:—

"An agreement made without consideration is void, unless —

- (a) it is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, and is made on account of natural love and affection between parties standing in a near relation to each other;

In any of these cases, such an agreement is a contract.

Explanation 1. — Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made."

I think a reasonable interpretation of this provision of the Contracts Ordinance is that a transfer by way of gift is void until it is registered but that the validity of the gift by way of such transfer, as between the donor and donee, is not affected. It follows therefore that in the case of a transfer of land the transferee as from the date of the transfer becomes the beneficial owner of the land, although the legal title will not vest in him until the transfer is duly registered. In the present case the plaintiffs are in fact the registered owners of the premises. In view of the circumstances under which they have become the registered owners some sort of rectification of the register may be necessary, but that is a matter between them and the legal personal representative of the deceased. Their title is capable of annulment or liable to be defeated, but until it is annulled or defeated they have the right to sue and are liable to be sued in respect of any claim relating to the premises.

Another ground on which the defendant resists the claim to possession is that the plaintiffs have no right to terminate the tenancy because of paragraph 2 of the Tenancy Agreement which reads as follows:

"The tenancy is continuous and the Landlord shall not terminate or eject the tenant unless and until the tenant is in arrears of rent to the extent of 2 months' rent, i.e., reckoning the deposit of 1 month rent of \$100.00."

The authority cited in support of this ground is the case of *Zimble and Another v. Abrahams*.⁽⁸⁾ If I understand that case correctly, it is an authority for the proposition that the defendant is not liable to be ejected if the Tenancy Agree-

ment is or can be construed to be an agreement to grant a lease for the life of the defendant and he is entitled to specific performance of that agreement. In this case the defendant has not counterclaimed for specific performance, nor do I think he can succeed on a claim for specific performance of that agreement. In my opinion clause 2 of the Tenancy Agreement does not make the tenancy a life tenancy. Moreover, if it were meant to be so, it is void as a lease under section 47 of the Land Code for lack of registration. It follows therefore this ground must also fail.

In making this claim for possession the plaintiffs, or at any rate the first four plaintiffs, say that they require the premises for occupation by themselves for the purpose of carrying on the business of a motor car agency. The fifth plaintiff is a trustee for the youngest son of the deceased. He has stated in evidence that he has no interest in the action but that he supports it as trustee for Kuan Teck Bee. The statement of claim also alleges that the defendant has been in arrears of rent for more than two months, but this part of the claim has not been supported by evidence so that it must be deemed to have been abandoned. The plaintiffs' claim therefore now rests entirely on the ground that they require the premises for themselves. As the premises are governed by the Control of Rent Ordinance, 1956, their claim falls to be decided under paragraph (f) of section 12(1) of the Ordinance.

The first condition to be satisfied for recovery of possession under paragraph (f) is that the contractual tenancy must be terminated by a notice to quit. In the case of a monthly tenancy there must be a month's notice if "there has been no change by purchase in the ownership of the premises since the 15th day of February, 1942". If there has been a change in the ownership since the relevant date, the tenancy must be "determined by not less than one year's notice to quit." It has been alleged in the Statement of Claim that there has been no change by purchase in the ownership of the premises since the 15th day of February, 1942. Consequently only a month's notice to quit has been given.

The question of change in ownership was not argued at the trial of the action, although from the evidence produced on behalf of the plaintiffs it is clear that there has been a change, at any rate in the beneficial ownership of the premises, since 1942 by reason of the gift with which I have dealt with at some length in the earlier part of my judgment. The question is whether this was a change in ownership by purchase. The view I took was that "purchase" is used in law not only in the popular sense of buying but

also in a technical sense to denote that a person has acquired land by the lawful act of himself or another, e.g., by conveyance, gift or advise, as opposed to title by act of the law. *Stroud's Judicial Dictionary*, 3rd Edition, Volume 3, page 2402, says that speaking technically, a person acquires by "words of purchase" and is a "purchaser" when he obtains title in any other mode than by descent or devolution of law. However, I have since heard arguments on this question and my attention has been drawn to the case of *Powell v. Cleland* ⁽⁹⁾ in which it was held that the word "purchasing" in paragraph (h) of Schedule 1 referred to in section 3(1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, is used with the ordinary, popular but precise meaning of that word — viz., the buying of a dwelling house or of an already existing interest therein. This case was cited with approval for the same view in *Lucas v. Lineham* ⁽¹⁰⁾. As our law is *in pari materia* with the English Rent Restriction Act I must accept the view that in the present case there has been no change in ownership by purchase.

Having decided that the plaintiffs have duly terminated the defendant's contractual tenancy and that there has been no change by purchase in the ownership of the premises since February 15, 1942, I have now to consider the plaintiffs' claim in the light of paragraph (f) of section 12(1) of the Control of Rent Ordinance, 1956. The relevant portion of that paragraph reads as follows:

"12. (1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely —

.....
(f) where the owner of the premises reasonably requires the same for occupation by himself....

Provided that an order or judgment shall not be made or given on any ground specified in this paragraph if the Court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the owner or the tenant, greater hardship would be caused by granting an order or judgment than by refusing to grant it;

Provided further that in the case of premises being used by the tenant for business... purposes... the Court is satisfied that the owner requires them for the purpose of carrying on his own business...."

The onus is upon the plaintiffs to prove that they reasonably require the premises for occupation by themselves. Their case, briefly, is that the first four plaintiffs are at present carrying on the business of agents for the sale of motor cars and motor cycles at No. 63 - 65, Batu Tiga Road, Klang, and that they intend to extend their business to Kuala Lumpur at their premises No. 88, Pudu Road, Kuala Lumpur. The first plaintiff in his evidence says that he is the managing partner of the firm at Klang and that the second,

A third and fourth plaintiffs are partners in that firm. The fifth plaintiff, as I have stated above, is a trustee for the youngest son of the previous owner of the premises. He is not a partner in the firm but he supports the action of the other plaintiffs for the recovery of possession of the premises.

B The first plaintiff has also stated that he has carried on negotiations with certain firms dealing in motor cars with a view to obtaining from them agencies for the sale of certain makes of motor cars. Representatives from Sing Ho Motor Co. Ltd., Kuala Lumpur, and Federal Auto Co. Ltd., Kuala Lumpur, have stated that the first plaintiff has approached them with a view to obtaining agencies from them for the sale of cars and motor cycles and that they have agreed to give the first plaintiff the agencies which he seeks without imposing any conditions as to the display of the motor cars in the premises in Kuala Lumpur. The fact that the plaintiffs have other businesses and that they are not going to depend solely on the business which they intend to carry on at the premises is wholly irrelevant to the issue. Taking into account all relevant circumstances, I find as a fact that the plaintiffs are making their claim for possession *bona fide* and not on capricious grounds. They have therefore discharged the onus which lies on them.

It has been contended by the defendant that as all the plaintiffs are not partners of United Trading Co. they are not entitled to an order for possession. The authority relied on by the defendant for this contention is the case of *McIntyre and Another v. Hardcastle* ⁽¹¹⁾ in which it was held that where two sisters, joint owners of a house within the Rent Restriction Act, sought possession of the house on the ground that the house was required as a residence for one of them only, the case was not within the relevant paragraph of the Act and that no order for possession could be made under it. It is also argued that it is only the first plaintiff who requires the premises to carry on his business. As against this, the first plaintiff has said that it is not necessarily the United Trading Co. which is going to do the business at the premises although that firm may join them. The only plaintiff who is not a member of the United Trading Co. is the fifth plaintiff but he has said that he supports the action because it will be in the interest of the person for whom he holds the beneficial interest in the premises on trust to join the business. In my opinion *McIntyre and Another v. Hardcastle* has no application to this case.

The next question to be considered is that of hardship. Here the onus of proving that greater hardship would be caused by granting

the order than by refusing to grant it lies upon the tenant: *Sims v. Wilson*.⁽¹²⁾ The test is hardship and not mere inconvenience: *Maguire v. Stewart*⁽¹³⁾ (cited by Magarry at page 264 of the 9th Edition). It is clear that the defendant at one time was using the premises both for business and as a residence. He has moved his business as manufacturer of Chinese tobacco and cigarettes to No. 46-C, Jalan Lima, Chan Sow Lin Road, so that the premises at present are used for purely residential purpose. When the premises were first built, I have no doubt they were more suitable as dwelling premises. With the expansion of Kuala Lumpur Town, they now come within an area which to my mind is essentially a business area. A big European firm dealing in motor cars is carrying on business in the neighbourhood. I think it will be correct to say that it is more difficult to find business premises than to find premises for residential purposes.

What the Court has to do is to balance the hardship which the plaintiffs will suffer by being kept out of the premises against the hardship which the defendant will suffer if he is deprived of the use of the premises for residential purposes. I am satisfied in my own mind that it would be more difficult for the plaintiffs to find business premises than for the defendant to find premises for residential purposes. It is clear that the defendant has taken no steps whatsoever to find accommodation elsewhere. He is by no means a poor man and I cannot believe that it would be difficult for him either to build a house of his own or to rent a house for himself and his family near his business premises. In fact there was evidence that there is a wooden house at the back of the factory which it might be convenient for the defendant to obtain on rent.

It has been urged by Mr. Peddie on behalf of the defendant, on the authority of *Nevill v. Hardy*,⁽¹⁴⁾ that the onus of proving suitable alternative accommodation for the tenant is on the landlord, but that I think is the case where the plaintiffs claim possession under paragraph (n) of Section 12(1) of the Control of Rent Ordinance, 1956. When the claim is made under paragraph (f) as in the present case, the sole question is one of hardship and what the Court is required to do is to weigh the respective merits in the case for each party. In his judgment in the Court of Appeal in the case of *the Perak Hauliers Ltd. v. The Cycle & Carriage Co. Ltd.*⁽¹⁵⁾ Ong J., said:

"As to the availability of 'other accommodation' I would observe that those words in the first proviso to paragraph (f) must be read with the words immediately following, 'is available for the owner or the tenant'; and that 'other accommodation' must be distinguished from 'suitable alternative accommodation' to be found in paragraph (n). When the landlord bases his claim on

paragraph (f) it is misleading for the tenant to raise in his defence the different provisions of another paragraph in which the requirements to be satisfied by the landlord are much more stringent."

Taking all the evidence into consideration, in my opinion the defendant has not discharged the onus which lies on him on the question of hardship. As I have said above, having regard to all the circumstances of the case, greater hardship will be caused by refusing the order for possession to the plaintiffs. However, this is a case in which the defendant should be given time to find other accommodation for himself. The order will therefore be that the defendant do deliver vacant possession of the ground floor of the premises on or before 31st December, 1963, and that he do pay all the rent due and accruing up to that date. The costs will follow the event.

Order accordingly.

Solicitors:—Lovelace & Hastings; Skrine & Co.

RAJA MOHAMED v. REGINA

[A.Cr.J. (Ambrose J.) August 17, 1963]

[Singapore — Magistrate's Appeal No. 239 of 1962]

Penal Code ss.378 and 381—Theft—Dishonest intention—Not necessary to move property out of possession.

To constitute theft there must be an intention to take dishonestly any movable property out of the possession of another person without that person's consent. It is sufficient if the person who has formed such dishonest intention moves that property in order to such taking; and it is not necessary for him to move that property out of the possession of the other person.

MAGISTRATE'S APPEAL.

R. Murugason for the appellant.

S. R. Chapkhana (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ambrose J.: In this case the appellant, who was a chemical mixer employed by the Singapore Glass Manufacturers Co. Ltd., was charged with theft of property in the possession of his employer under section 381 of the Penal Code. It was alleged that on the 15th October, 1962, at about 7.45 p.m. at the Company's premises at Henderson Road, Singapore, he committed theft in respect of two dozen drinking glasses valued at \$2 in the possession of the Company. He was convicted by the trial Magistrate and sentenced to one day's imprisonment and a fine of \$300.

It was submitted on behalf of the appellant that, though the Magistrate found that the two dozen glasses were removed by him from the